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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

LANDMARK TECHNOLOGY, LLC, a  
California limited liability company,

Plaintiff,

v.

AZURE FARMS, INC., an Oregon  
corporation,

Defendant.

Case No. 3:18-cv-01568-JR

OBJECTIONS OF AMICUS TO FINDINGS  
AND RECOMMENDATIONS

Amicus Attorney General Ellen Rosenblum objects to the Findings and Recommendations (ECF No. 80). For the reasons explained in the previously filed amicus memorandum (ECF No. 56), the recommended finding that ORS 646.810 is entirely preempted by federal patent law is in error.

Specifically, the Finding and Recommendations' conclusion is inconsistent with binding precedent from the Federal Circuit. The Findings and Recommendations reason that Oregon's statute requires a plaintiff to prove a case only by a preponderance of the evidence, while federal

law allows liability for bad faith patent claims only when proved by clear and convincing evidence. Findings and Recommendations at 11.

As the Attorney General's amicus brief explains, in *Hunter Douglas, Inc. v. Karavan Trailers, Inc.*, 153 F.3d 1318, 1332 (Fed. Cir. 1998), overruled on other grounds by *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999), the Federal Circuit Court of Appeals stated that "a state law is not per se preempted unless every fact situation that would satisfy the state law is in conflict with federal law." The Findings and Recommendations do not address this requirement, or explain why it is impossible to imagine a fact situation in which an Oregon plaintiff could prove bad faith by clear and convincing evidence.

Instead, the Findings and Recommendations reason that the Oregon State Legislature would not have understood that it was creating a cause of action that required a plaintiff to meet the "clear and convincing evidence" standard of proof, and that preserving the state law claim while adding that requirement would therefore run contrary to the intent of the enacting legislature. Findings and Recommendations at 11. But the federal requirements are not adding elements to a state law claim – they are simply an independent hurdle to avoid a preemption defense. See *Hunter Douglas, Inc.*, 153 F.3d at 1337. The Attorney General respectfully submits that completely eliminating the state law cause of action would do far greater violence to likely legislative expectations than allowing the cause of action to continue to exist so long as plaintiffs can also meet the higher burden of proof independently required by federal law.

The Attorney General also reiterates that federal courts' general reluctance to find state statutes invalid rests on important principles of federalism. Those principles are discussed in the Attorney General's amicus memorandum (EFC No. 56) at pages 9-10.

For the above reasons, and as explained in her amicus memorandum, the Oregon Attorney General respectfully objects to the proposed Findings and Recommendations, and respectfully submits that the Court should instead, as this district has done in the past, evaluate the question of preemption on a case-by-case basis, looking to the facts alleged in the particular case before the Court.

DATED July 10, 2019.

Respectfully submitted,

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